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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1940

No. 480

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN and C. D. CUTLER, as Trustees of District Landowners Trust, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER and HUBERT L. SHATTUCK, Petitioners,

vs.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, ELLA BOSTWICK, GLEN BOSTWICK, ELLA BETH B. BOSTWICK, STEPHEN J. CURTIS, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO SUPPLEMENT RECORD, SUPPLEMENTAL RECORD, ASSIGNMENTS OF ERROR, BRIEF IN SUPPORT THEREOF

IRVING E. MELVILLE,
Security Building, Denver, Colorado,
Attorney pro se and for other Petitioners.

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No. 480

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN and C. D. CUTLER, as Trustees of District Landowners Trust, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER and HUBERT L. SHATTUCK, PETITIONERS,

vs.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, ELLA BOSTWICK, GLEN BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a corporation, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO SUPPLEMENT RECORD

Come now the petitioners above named and respectfully request this Honorable Court, in the above entitled and numbered cause, to issue a Writ of Certiorari to division 4 and to the judge thereof of the district court of the city and county of

Denver in the state of Colorado in Cause No. A-23959 for the material part of the record subsequent to the original Record now before this Court in Cause No. 14634 of the supreme court of the state of Colorado—and, as grounds therefor, petitioners District Landowners Trust and said Trustees show and make known to this Court that the written contract between said Trust and plaintiffs below, respondents here, has been wrongfully canceled and set aside by said district court, and that said named petitioners have each been deprived of their property and property rights by said court without due process of law, and each has been denied the equal protection of the law by said court; and that the above named petitioners, appearing in their individual capacities, have each been deprived of his personal and property rights without due process of law, and each has been denied the equal protection of the law, by said court —all of said acts of said district court have been done in direct contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in direct violation of Section 25 of Article II of the constitution of the state of Colorado.

Respectfully submitted,

IRVING B. MELVILLE,
Security Building, Denver, Colorado,
Attorney *pro se, and* Attorney for
the other named Petitioners

SUMMARY STATEMENT.

Your petitioners assert that, as appears from the certified copies of the proceedings of division 4 of the district court of the city and county of Denver in the state of Colorado in cause numbered A-23959

made subsequent to the proceedings included in the original Record on Writ of Certiorari in Cause No. 480, while the petition for a rehearing filed by defendants in error therein was pending and undetermined, defendants filed in said district court three special demurrers to the complaint in said Cause (the remittitur having been issued to the trial court on April 8, 1940), but were unable to obtain a hearing thereon until June 7, 1940, and on said latter date said district court promptly overruled each of said demurrers, to which rulings exceptions were saved, and gave defendants ten days within which to either answer or elect to stand on said demurrers, and within the time granted defendants appeared by their attorney and announced their election to stand on said respective demurrers and requested that judgment thereon should be promptly entered, but said court refused to enter judgment on any thereof on the announced ground that the respective amounts of said judgments could not be determined at that time; and that, at a subsequent hearing, when none of defendants or their attorney was present, said district court set aside defendants' election to stand on said demurrers and extended the time another period of ten days within which to elect, and prior to said latter date defendants served notice on opposing counsel that on such date they would appear and again elect and ask that judgment be entered against each of them at said time, to-wit, on August 7, 1940; that on said August 7, 1940, these defendants were informed by opposing counsel and the division clerk of said court that judge Hicks was on a vacation but had arranged for another district division judge to hear all routine matters in the former's absence, and all the files in said cause were reported by said division clerk to be locked up in the

desk of Judge Hicks for which the clerk had no key, but, as the notice served contained the former order, defendants' election to stand on their respective demurrers was entered by district Judge Johnson, who, without any data from said court files, could not enter final judgment; and your petitioners assert that said district court still refuses to enter any final judgment and, in their opinion, no final judgment will be entered until said farm properties and buildings and fences are so run down and deteriorated that no further income will be available from this source.

That your petitioners further assert that said receiver still retains in his hands all of the property and assets and books and records and secured promissory notes and accounts belonging to District Landowners Trust, and continues to rent said improved farms to tenant farmers and collect the proceeds of all crops, but has made no effort to collect from said The East Denver Municipal Irrigation District an indebtedness upwards of $200,000, nor to collect from owners of irrigation district lands either the principal or interest of their secured promissory notes belonging to the Trust, nor has he paid the taxes on any of said lands although long past due, nor has he kept the buildings or fences in repair, nor paid any current bills or indebtedness matured, but has used and is continuing to use Trust funds for paying his own salary and expenses and the salary and expenses of an attorney employed by him as attorney for the receiver.

Your petitioners are credibly informed and believe that respondents herein will make no answer to the original Writ of Certiorari herein, but are relying on the premise that neither said district court nor said supreme court was specifically advised by the pleadings or otherwise that defendants were

in any way relying upon any portion of the Federal Constitution in the trial of this Cause.

Your petitioners assert that they were unable and continue to be unable to present to the supreme court of Colorado or to file therein the supplemental record hereto appended on account of the rules of practice in the supreme and district courts of the state of Colorado holding that the overruling or sustaining a demurrer cannot be reviewed until final judgment is entered in said cause.

This rule is unreasonable and unjust in the circumstances of this Case, and should not be sustained by this court or allowed to interfere with the granting of this Writ of Certiorari.

Respectfully submitted,

IRVING B. MELVILLE,
Security Building, Denver, Colorado,
Attorney *pro se* and Attorney for
the other named Petitioners.

DISTRICT COURT
CITY AND COUNTY OF DENVER
SECOND JUDICIAL DISTRICT

STATE OF COLORADO, }
City and County of Denver } ss.

Pleas in the District Court of the City and County of Denver, State of Colorado, in the Fourth Division thereof, before the Hon. Henry A. Hicks, one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court House in Denver, in said county, on the second Tuesday (it being the 9th day) of April, A. D. One Thousand Nine Hundred Forty.

Present:

HONORABLE HENRY A. HICKS,
one of the judges of the District Court.

JOHN A. CARROLL,
Esq., District Atorney of said District.

W. E. GUTHNER,
Esq., Manager of Safety and Excise and Ex-officio Sheriff of said County

F. W. SANBORN,
Esq., Clerk of said Court.

Filed in District Court, City and County of Denver, Colo., May 16, 1940. F. W. Sanborn, Clerk.

STATE OF COLORADO, }
City and County of Denver } ss.

IN THE DISTRICT COURT

No. A23959 Div. IV.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, MARJORIE DAVIS, ELLA BOSTWICK, GLEN M. BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN MCHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITIES COMPANY, a corporation,
Plaintiffs,

vs.

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN AND C. D. CUTLER, AS TRUSTEES, OF DISTRICT LANDOWNERS TRUST, THE EAST DENVER MUNICIPAL IRRIGATION DISTRICT, DISTRICT LANDOWNERS TRUST, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER, ED. SHAW AND HUBERT L. SHATTUCK,
Defendants.

DEMURRERS TO COMPLAINT

Comes now the individual defendants above named, I. B. Melville, H. G. Day, Charles C. Sackmann and C. D. Cutler, individually, by their attorney, and demur to the complaint herein, and, for grounds therefor, show and make known to this Court that, as appears from the face of the complaint and Exhibit A attached thereto and made a part thereof:

I.

Parties plaintiff herein are without legal capacity to institute or to maintain this action.

II.

This court is without jurisdiction of the subject of the action by reason of a defect of parties plaintiff.

III.

This court is without jurisdiction of this cause at this time, because this cause is now pending in the Supreme Court of this State, in which cause a supersedeas has been issued to this court and is still in full force and effect.

IV.

There is a misjoinder of parties defendant in that defendants, individually, are joined with defendants, as trustees, thereby seeking a judgment against each of them as individuals, and a judgment against each as a trustee, and also a judgment against defendant District Landowners Trust.

V.

There is a misjoinder of causes of action, in that there is a cause of action against these defendants, individually; a cause of action against these defendants as trustees; and a cause of action against defendant District Landowners Trust.

VI.

There is a defect of parties plaintiff in that neither the *cestui cue trustents* owning land in said The East Denver Municipal Irrigation District nor the creditors of defendant District Landowners Trust are parties hereto.

VII.

The complaint does not state facts sufficient to constitute a cause of action against these defendants.

VIII.

Overruling the above demurrers would be depriving these defendants of their property without due process of law and contrary to Art. II, § 25, of the Constitution of the State of Colorado, and contrary to the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

HAROLD G. KING,
Attorney for the individual defendants above named.

Filed in District Court, City and County of Denver, Colo., May 16, 1940. F. W. Sanborn, Clerk.

STATE OF COLORADO, }
City and County of Denver } ss.

IN THE DISTRICT COURT

No. A23959 Div. IV.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, MARJORIE DAVIS, ELLA BOSTWICK, GLEN M. BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN MCHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITIES COMPANY, a corporation,
Plaintiffs,

vs.

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN AND C. D. CUTLER, AS TRUSTEES, OF DISTRICT LANDOWNERS TRUST, THE EAST DENVER MUNICIPAL IRRIGATION DISTRICT, DISTRICT LANDOWNERS TRUST, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER, ED. SHAW AND HUBERT L. SHATTUCK,
Defendants.

DEMURRERS TO COMPLAINT

Comes now the defendants I. B. Melville, H. G. Day, A. C. Monson, Charles C. Sackmann and C. D. Cutler, as Trustees of District Landowners Trust, by their attorney, and demur to the complaint herein, and, for grounds therefor, show and make known to this Court that, as appears from the face of the complaint and Exhibit A attached thereto and made a part thereof:

I.

Parties plaintiff herein are without legal capacity to institute or maintain this action.

II.

This court is without jurisdiction of the subject of the action by reason of a defect of parties plaintiff.

III.

This court is without jurisdiction of this cause at this time, because this cause is now pending in the Supreme Court of this State, in which cause a supersedeas has been issued to this court and is still in full force and effect.

IV.

There is a misjoinder of parties defendant in that defendants, as trustees, are joined with defendants, individually, thereby seeking a judgment against each of them as trustees, and a judgment against each as an individual, and also a judgment against defendant District Landowners Trust.

V.

There is a misjoinder of causes of action, in that there is a cause of action against these defendants as trustees; a cause of action against these defendants, individually; and a cause of action against defendant District Landowners Trust.

VI.

There is a defect of parties plaintiff in that neither the *cestui que trustents* owning land in said The East Denver Municipal Irrigation District nor the creditors of defendant District Landowners Trust are parties hereto.

VII.

The complaint does not state facts sufficient to constitute a cause of action against these defendants.

VIII.

Overruling the above demurrers would be depriving these defendants of their property without due process of law and contrary to Art. II, § 25, of the Constitution of the State of Colorado, and contrary to the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

HAROLD G. KING,
Attorney for the Trustees Above Named.

Filed in District Court, City and County of Denver, Colo., May 16, 1940. F. W. Sanborn, Clerk.

STATE OF COLORADO, } ss.
City and County of Denver }

IN THE DISTRICT COURT

No. A23959 Div. IV.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, MARJORIE DAVIS, ELLA BOSTWICK, GLEN M. BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN MCHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITIES COMPANY, a corporation,
Plaintiffs,

vs.

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN AND C. D. CUTLER, AS TRUSTEES, OF DISTRICT LANDOWNERS TRUST, THE EAST DENVER MUNICIPAL IRRIGATION DISTRICT, DISTRICT LANDOWNERS TRUST, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER, ED. SHAW AND HUBERT L. SHATTUCK,
Defendants.

DEMURRERS TO COMPLAINT

Comes now the District Landowners Trust, one of the defendants above named, by its attorney, and demurs to the complaint herein, and, for grounds therefor, shows and makes known to this Court that, as appears from the face of the complaint and Exhibit A attached thereto and made a part thereof:

I.

Parties plaintiff herein are without legal capacity to institute or to maintain this action.

II.

This court is without jurisdiction of the subject of the action by reason of a defect of parties plaintiff.

III.

This court is without jurisdiction of this cause at this time, because this cause is now pending in the Supreme Court of this State, in which cause a supersedeas has been issued to this court and is still in full force and effect.

IV.

There is a misjoinder of parties defendant in that this defendant is joined with certain defendants, individually, and with certain defendants, as trustees, thereby seeking a judgment against each of them as individuals, and a judgment against each of them as a trustee, and also a judgment against this defend- District Landowners Trust.

V.

There is a misjoinder of causes of action, in that there is a cause of action against this defendant; against certain defendants, individually and a cause of action against certain defendants as trustees.

VI.

There is a defect of parties plaintiff in that neither the *cestui que trustents* of this defendant owning land in said The East Denver Municipal Irrigation District nor the creditors of this defendant are parties hereto.

VII.

The complaint does not state facts sufficient to constitute a cause of action against this defendant.

VIII.

Overruling the above demurrers would be depriving this defendant, its *cestui que trustents* and creditors, of its and their property without due process of law and contrary to Art. II, § 25, of the Constitution of the State of Colorado, and contrary to the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

HAROLD G. KING,
Attorney for Defendant District
Landowners Trust.

Be It Remembered, That heretofore, and on to-wit, the 7th day of June, A. D. 1940, the same being one of the regular juridical days of the April A. D. 1940 Term of Court, the following proceedings, inter alia, were had and entered of record in said Court, to-wit:

—o—

ARTHUR WEYBREW, et al, vs. I. B. MELVILLE, et al. No. A 23959 ORDER OF COURT

At this day come the parties hereto by their attorneys, respectively.

And thereupon, this cause coming on to be heard upon the demurrers of the defendants, I. B. Melville, H. G. Day, Charles C. Sackmann and C. D. Cutler, individually, to the complaint, the same is argued by counsel, and the Court being now sufficiently advised in the premises, doth overrule said demurrers.

Whereupon, it is ordered by the Court that the said defendants, individually, may have time and

until ten (10) days to elect whether to stand on their demurrers or twenty (20) days to answer.

—o—

ARTHUR WEYBREW, et al, vs. I. B. MELVILLE, et al. No. A 23959 ORDER OF COURT

At this day come the parties hereto by their attorneys, respectively.

And thereupon, this cause coming on to be heard upon the demurrers to the complaint of the defendants, I. B. Melville, H. G. Day, A. C. Monson, Charles C. Sackmann and C. D. Cutler as Trustees, the same is argued by counsel, and the Court being now sufficiently advised in the premises, doth overrule said Trustee demurrers.

Whereupon, it is ordered by the Court that the said defendants as Trustees, may have time and until ten (10) days to elect whether to stand on their demurrer or twenty (20) days to answer.

—o—

ARTHUR WEYBREW, et al, vs. I. B. MELVILLE, et al. No. A 23959 ORDER OF COURT

At this day come the parties hereto by their attorneys, respectively.

And thereupon, this cause coming on to be heard upon the demurrers of the defendant, Landowners Trust, to the complaint, the same is argued by counsel, and the Court being now sufficiently advised in the premises, doth overrule said demurrers.

Whereupon, it is ordered by the Court that the

defendant Landowners Trust, may have time and until ten (10) days to elect whether to stand on its demurrers or twenty (20) days to answer.

——o——

And Afterwards, and on to-wit, the 17th day of June, A. D. 1940, the following further proceedings inter alia, were had and entered of record in said Court to-wit:

——o——

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day come the defendants, I. B. Melville, H. G. Day, Charles C. Sackmann, and C. D. Cutler, individually, and elect to stand on their demurrer to the complaint.

——o——

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day come the defendants, I. B. Melville, H. G. Day, Charles C. Sackmann, and C. D. Cutler, as Trustees, and elect to stand on their demurrer to the complaint.

——o——

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day comes the defendant, the District Landowners Trust, by its attorney, and elects to stand on its demurrer to the complaint.

——o——

And Afterwards, and on to-wit, the 18th day of June, A. D. 1940, the following further proceedings, inter alia, were had and entered of record in said Court, to-wit:

—o—

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day this cause coming on for hearing upon the defendant's oral application for entry of final judgment herein, except A. C. Monson, individually and The East Denver Municipal Irrigation District, a quasi public corporation, and said defendants, except A. C. Monson, and The East Denver Municipal Irrigation District, a quasi public corporation, having heretofore elected to stand on their respective demurrers to the complaint, and the Court, after hearing the statements of counsel, and on its own motion, orders this cause continued for hearing until the 18th day of July, A. D. 1940, at 9:30 o'clock.

—o—

And Afterwards, and on to-wit, the 18th day of July, A. D. 1940, the following further proceedings, inter alia, were had and entered of record in said Court, to-wit:

—o—

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day comes the defendant, C. D. Cutler, individually and as Trustee of District Landowners' Trust, by his attorney, and thereupon, on his oral motion made in open Court.

It is ordered by the Court that the order heretofore entered herein on June 17, 1940, wherein it was ordered that all of the defendants herein stood upon the decision on the demurrers that they had heretofore filed herein, be, and the same is hereby set aside and held for naught as to the said defendant, C. D. Cutler, be permitted to file his answer herein forthwith, and that the plaintiffs may have ten days from this day to reply to the said answer, as they may be advised.

——o——

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day come the plaintiffs herein, by their attorney, Lewis A. Dick, Esq., and the defendants Charles C. Sackmann and C. D. Cutler, by their attorney, Frank E. Hickey, Esq., and the defendants I. B. Melville and H. G. Day, not appearing.

And it appearing to the Court that this cause was on June 18, 1940, continued until this day for further hearing, on the Court's own motion,

(the 18th day of July, A. D. 1940)

It is ordered by the Court that the order of June 17, 1940, as to the defendants, I. B. Melville and H. G. Day, be modified wherein it was provided that the said defendants might have ten (10) days to elect, after the Court had overruled the said defendants' demurrer; and it appearing to the Court that no final disposition was made in said cause; and it further appearing to the Court that the said defendants, I. B. Melville and H. G. Day, were not entitled to make an election in the matter; and it

also appearing to the Court that the said defendants may have been misled by said order of election.

It is ordered by the Court that the said order of June 17, A. D. 1940, is hereby amended so that the said defendants be, and hereby are, allowed time until twenty (20) days from this date to file their answers herein.

——o——

And Afterwards, and on to-wit, the 7th day of August, A. D. 1940, the following further proceedings, inter alia, were had and entered of record in said Court, to-wit:

Judge Stanley H. Johnson sitting for Judge Henry A. Hicks.

——o——

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day come the defendants, I. B. Melville, H. G. Day and District Landowners Trust, and thereupon, on said defendants' motion, advising the Court that they stand on their demurrer which was heretofore overruled by the Court, on June 7, 1940, and that the same be made a matter of record herein, and that said motion be granted.

It is ordered by the Court that motion for final judgment be set for hearing in the Division to which the case belongs, when the Honorable Judge of said Division returns.

STATE OF COLORADO, }
City and County of Denver } ss.

SINGLE CERTIFICATE.

I, F. W. Sanborn, Clerk of the District Court of the City and County of Denver, State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of Orders of Court and Demurrers had and entered of record in a certain cause in said Court lately depending wherein Arthur Weybrew, et al, Plaintiffs, and I. B. Melville, et al, Defendants, as the same now remains on file and of record in this office.

Witness, F. W. Sanborn, Clerk of said Court, with the seal thereof hereunto affixed at his office, in the City and County of Denver, State of Colorado, this 24th day of October, A. D. 1940.

SEAL

(Signed) F. W. SANBORN,
Clerk.

By J. G. McCONNELL,
Deputy Clerk.

PETITIONERS' ASSIGNMENTS OF ERROR.

Come now your petitioners and make known to this Honorable Court that division 4 of the district court of the city and county of Denver in the state of Colorado in Cause No. A-23959 and the judge thereof committed grievous errors in the orders and rulings made therein subsequent to the proceedings set forth in the original Record on Writ of Certiorari now pending in this court, in the following particulars:

First. In erroneously overruling the three special demurrers to the complaint in said Cause, each such ruling being in violation of petitioners' rights protected by section 25 of Article II of the constitution of the state of Colorado and by section 1 of the Fourteenth Amendment to the Constitution of the United States.

Second. In refusing to dismiss the proceeding and order the books and records and accounts to be returned to defendants District Landowners Trust and to the Trustees named in said complaint—such refusal being in contravention of defendants' rights under section 25 of Article II of the constitution of the state of Colorado, and in contravention of their rights under section I of the Fourteenth Amendment to the Constitution of the United States.

Third. In refusing to discharge the receiver and to require him to return all the books and records and accounts and assets and property of the Trust in District Landowners Trust and to the Trustees named in said complaint—such refusal being in contravention of defendants' rights under the above stated provisions of the Colorado and United States Constitutions.

Fourth. In refusing to enter final judgment in said Cause after defendants had elected to stand on said demurrers, and in still refusing so to do and in taking no action to ascertain what amount said court intends to enter against each of these defendants.

Respectfully submitted,

IRVING B. MELVILLE,
Security Building, Denver, Colorado,
Attorney *pro se* and Attorney for
the other Petitioners above named.

BRIEF OF PETITIONERS IN SUPPORT OF WRIT.

Both the judge of the trial court and the judges of the supreme court took the oath of office required by the constitution of the State of Colorado, Article XII, Section 8, reading as follows:

> "Every civil officer, except members of the general assembly and such inferior officers as may be by law exempted, shall, before he enters upon the duties of his office, take and subscribe an oath or affirmation to support the constitution of the United States and of the state of Colorado, and to faithfully perform the duties of the office upon which he shall be about to enter."

It would not be proper for petitioners or for this Honorable Court to presume that either the trial court or the members of the supreme court decided the matters presented to each in this Cause in order to defeat the jurisdiction of this court, hence we must assume that each of said judges honestly believed that the facts and issues presented in the trial court did not come within the prohibition of Article II, Section 25, of the Colorado constitution, reading:

> "No person shall be deprived of life, liberty or property, without due process of law;"

nor within the prohibition of Section 1 of the Fourteenth Amendment to the Constitution of the United States, reading:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

> the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Nor will it be presumed that the trial judge or any judge of the state supreme court does not know that it requires legally competent parties to institute and maintain an action, and that without such competent parties, the trial court has no jurisdiction; nor presumed that the judge of any court of equity and law does not know the due process of law provisions of the state and federal constitutions, and does not know the meaning of judicial confiscation of property—since it is a matter of common knowledge that every such judge is familiar with the fundamental provisions of his state constitution and with the fundamental provisions of the Constitution of the United States—this is not a question involving the Federal constitutionality of a state statute or state public utility or commission, where necessarily the particular statute or the particular rules and regulations complained of as contrary to the Federal constitution must be called to the attention of the trial court and to the attention of the state supreme court but only a case in which all the proceedings of the trial court are in contravention of defendants' rights under both the state constitution and the constitution of the United States.

In *Furman v. Nichol,* 8 Wall. 44, 19 L. Ed. 370, the case involved the Bank of Tennessee which, inter alia, had guaranteed its issue of bank notes by making the latter legal payment at par for taxes, this clause being repealed in 1865, but the money tendered in August 1866 was issued prior to 1861; and, on Au-

gust 1, 1886, plaintiffs below, plaintiffs in error in the U. S. Sup. Ct., tendered their said bank notes to Nichol, the collector of taxes, in payment of taxes for the year ending August 26, 1866, and he refused to accept such money and asked for legal tender of United States; plaintiffs then filed their petition in the state circuit court of that county asking for a mandamus to compel the collector to accept said Tennessee Bank Notes, setting out the plain facts only without any reference to a Federal question being involved; and to this petition defendant filed a demurrer, which on argument was overruled, and the cause was taken by defendant collector on error to the state supreme court, which reversed the judgment, sustained the demurrer, and dismissed the petition—whereupon plaintiffs sued out this writ of error in the Supreme Court of the United States to review the judgment of the state supreme court. Defendant in error promptly challenged by motion the jurisdiction of the Supreme Court of the United States to review the state court judgment, and the case was fully argued both as to the question of jurisdiction and upon the merits. The Court, beginning at page 375 of the L. Ed., said:

> "It is enough for the purposes to say, that a cause can be removed from a state court into this court under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right, he claimed it gave him, was denied to him by the state court. It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to their case, should be contained in the plead-

ings, but this is in no case necessary. If the record shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the *court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand,* then *the jurisdiction of this court attaches.* And *it need not appear that the state court erred in its judgment.* It is *sufficient to confer jurisdiction that the question was in the case, was decided adversely to plaintiffs in error,* and that *the court was induced by it to make the judgment which it did.*" (Italics ours.)

Testing the case at bar by these rules, it is apparent that it is properly here, and must be disposed of on its merits. (Continuing at page 376):

"The application for the writ proceeded on the theory that the state had, in the passage of the Act creating the Bank of Tennessee in 1838, made a contract with its people to receive these notes in payment of states taxes, and that it was not in the power of a subsequent Legislature to impair the binding force of this contract.

"The proceeding was an effort on the part of the plaintiffs in error to test the question of the validity of the authority of a public officer of the State, exercising authority under the State, on the ground that such authority was repugnant to that provision of the Federal Constitution which forbids a state to pass any law impairing the obligation of a contract. The purpose of the petition, the issue which it presented and sought to have determined, were as plainly to be seen, as if the words of the particular

provision relied on had been inserted in it, and the obnoxious legislation spread out at length. *All courts take notice, without pleading, of the Constitution of the United States, and the public laws of the State where they are exercising their functions.* (Italics ours.)

"It is insisted that the petition should have averred that the State had impaired, or by some act attempted to impair, the obligation of a contract, but this does sufficiently appear by necessary intendment, for it is alleged that Furman was the owner of the notes and entitled to have them received for taxes, by virtue of a contract with the State; that he had tendered them to the defendant, who refused to receive them, and that it was not in the power of the Legislature to impair the validity of this contract.

"The *mandamus* was asked for to enforce a contract—to act directly on Nichol, the clerk and collector, who was exercising an authority under the State. What is plainer than that this proceeding impeached this authority, in its application to this case, because the legislation construed by this officer as depriving Furman of his right to pay his state taxes in notes of the Bank of Tennessee. If so, then the petitioners, insisting on the protection of the Constitution, drew in question both the validity of the state legislation and the authority of the state officer, and unless the record discloses that the supreme court of Tennessee denied relief, on other than Federal grounds, it is perfectly manifest that we are compelled to take jurisdiction of this cause. * * * * *

"What possible difference can it make, in deciding the question of jurisdiction, on which

of these three grounds (of the demurrer) the supreme court of Tennessee based their judgment. The right and duty of this Court to hear and determine this case does not depend on our ability to prove that the supreme court of Tennessee was wrong in its judgment. Whether that judgment was right or wrong, it is reviewable here, if it necessarily drew in question the validity of a state statute, or of an authority exercised under it, on the ground of the repugnancy of the statute to the Constitution of the United States. That it did do this there would seem to be no doubt.

"The defense really amounts to this, either that the alleged contract did not exist, or if it did, that there has been no legislation that impairs it.

"Whether it be true or false, depends upon the construction to be given to the laws of the State, which are claimed as proving the making of the contract and its violation.

"If so, this court decides for itself, whether the construction which the court below gave to these different statutes was correct or incorrect; and we are required to reverse, under the 25th section of the Judiciary Act, if we find that under an error of construction, that court has adjudged that no contract has been impaired. To do otherwise, would be to surrender to the state courts an important trust confided to this court by the Constitution."

In the leading case of *Crowell v. Randall,* 10 Peters 368, 9 L. ed. 458, a motion was made to dismiss the suit for want of jurisdiction upon the ground that there was nothing apparent on the rec-

ord to bring the case within the revising power of the Supreme Court of the United States under the twenty-fifth section of the Judiciary Act of 1789, and Mr. Justice Story in delivering the opinion of the court, beginning at page 382 of Peters and 467 of the L. ed., inter alia, said:

> "In the interpretation of this section of the Act of 1789, it has been uniformly held that to give this court appellate jurisdiction, two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and, second, that a decision was actually made thereon by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable that they did exist and were made. The principal, perhaps the only important difficulty which has ever been felt by the court, has been in ascertaining in particular cases whether these matters (the question and decision) were apparent on the record. And here the doctrine of the court has been that it is not indispensable that it should appear on the record, *in totidem verbis*, or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient if it is clear from the facts stated by just and necessary inference, that the question was made, and the court below must, in order to have arrived at the judgment pronounced by it, have come to the very de-

cision of that question as indispensable to that judgment."

And, after reviewing all the cases in point up to that time, continues at pages 398 and 470, respectively:

"These are all the cases, it is believed, in which the construction of the twenty-fifth section of the Judiciary Act has been made matter of controversy; and they extend over a period of more than twenty-five years. They exhibit an uniformity of interpretation of that section which has never been broken in upon. They establish, so far as a course of decisions can establish, the propositions already stated in the early part of this opinion. The period seems now to have arrived in which the court should, upon a full review of all the cases, with a view to close, if possible, all future controversy on the point, reaffirm the interpretation which they have constantly maintained. It is, that to bring a case within the twenty-fifth section of the Judiciary Act, it must appear on the fact of the record. *1st.* That some one of the questions stated in that section did arise in the state court. *2d.* That the question was decided by the state court, as required in the same section. *3d.* That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct anl positive terms, *ipsissimis verbis;* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment. *4th.* That it is not sufficient to show that a question might have arisen or been applicable to the

case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case."

In *Bridge Proprietors v. Hoboken L. and I. Co.*, 1 Wall. 68 U. S. (116, 17) L. ed. 571, under a similar state of facts as in the *Crowell Case* which is cited and approved as a leading case reported at page 575, L. ed., said:

> "It would be a new rule of pleading and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and the defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.'"

In *Great Northern R. Co. v. Washington*, 300 U. S. 154, 165, 81 L. ed. 573, 581, this Court said:

> "We come now to the question whether, when the asserted right has been denied, this court is concluded by a finding of fact or a mixed finding of law and fact made by the state court. We have repeatedly held that in such case we must examine the evidence to ascertain whether it supports the decision against the claim of federal right."

In *Magwire v. Tyler*, 8 Wall. (75 U. S.) 650, 660, 29 L. ed. 320, 324, a similar condition to the above existed, and defendants in error objected to the jurisdiction of this Court to review on the ground that the state supreme court had determined the question on non-federal grounds, and at the latter pages this Court said:

> "Certain it is that federal questions are directly involved in the pleadings, and if it appears that none of the other defenses afford any legal answer to the suit, the conclusion must be *not presume that the court below decided the not presume that the court below decided the other issues erroneously in order to defeat their own jurisdiction.*"

In *Norris v. Alabama*, 294 U. S. 587, 590, 79 L. ed. 1074, 1077, the state supreme court affirmed the judgment of the lower court that no discrimination had been shown against colored jurors who came within the qualifications of a juror, and at the last mentioned pages of the Reports, this Court said:

> "The question is of the application of this established principle to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specifically set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of

a state court as to a federal right and findings of facts are so intermingled that the latter control the former, it is incumbent upon us to analyse the facts in order that the appropriate enforcement of the federal right may be assured."

In *Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. ed. 690, 701, the point was whether a federal question was or was not involved in the decision of the state supreme court, and this Court, at the latter pages, said:

> "But the federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guarantees may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment (citing cases and with approval the following excerpts): But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."

In *Honeyman v. Hanan*, 300 U. S. 14, 18, 81 L. ed. 476, 479, involving the information of whether or not a federal question was presented for decision to the highest court of a state, at the latter pages this Court said:

> "As this court must decide whether it has jurisdiction in a particular case, this court must determine whether the federal question was necessarily passed upon by the state court. That

determination must rest upon an examination of the record. A certificate or statement by the state court that a Federal question has been presented to it and necessarily passed upon is not controlling."

In *American Propelling Co. v. United States*, 300 U. S. 475, 478, 81 L. ed. 751, 754, in speaking of a principle applicable to the United States when it becomes a party to litigation when justice can be done without endangering any public interest, which we think applies here, at the latter pages this Court said:

> "If the principle just stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

In *Langnes v. Green*, 282 U. S. 531, 541, 75 L. ed. 520, 526, on Writ of Certiorari to the U. S. Circuit court of appeals reversing a decree of a U. S. district court concerning the wages of a seaman and the discretion of the lower court, at the latter pages said:

> "The term 'discretion' denotes the absence of a hard and fast rule (citing case using such language). When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law,

and directed by reason and conscience of the judge to a just result."

Respectfully submitted,

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